



September 6, 2001

Ms. Sarajane Milligan
Assistant County Attorney
County of Harris
1019 Congress, 15th Floor
Houston, Texas 7002-1700

OR2001-3972

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151606.

The Harris County Attorney's Office (the "county attorney") received a request for several categories of information relating to an automobile accident and resulting health care expenses of a named individual.¹ You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address a procedural matter. Among other requirements, the county attorney was required to submit to this office copies of the specific information requested, or representative samples if the information is voluminous, not later than the fifteenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(e)(1)(D). Of the five categories of information sought by the requestor, you have submitted for our review information responsive to categories one and two. Although you do not address the existence of information responsive to the remaining categories, you assert that "all of the documents requested should be exempted from disclosure." Chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. Open Records Decision No. 362 (1983). However, to the extent that the county attorney possesses information responsive to the remaining request categories that was not submitted to this office for review, the county attorney failed to comply with section 552.301(e)(1)(D) with regard to such

¹The requestor seeks 1) a copy of the accident report; 2) a summary of all medical expenses, including the provider and the amount of the bill; 3) disclosures or certificates of insurance, including but not limited to liability/uninsured/underinsured and personal injury protection coverage; 4) the pleadings and answers in any pending litigation; and 5) the county's proposed distribution of the total settlement proceeds.

information, and we therefore have no basis upon which to conclude that such information is excepted from disclosure. Any such information must therefore be released to the requestor. *See* Gov't Code §§ 552.301(e)(1)(D), .302. We next address the submitted information.

In response to the first request category, you have submitted an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code by a county sheriff's officer. Access to accident reports completed pursuant to chapter 550 of the Transportation Code is governed by law other than the Public Information Act. Section 550.065(b) of the Transportation Code provides that except as provided by subsection (c), accident reports are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be codified at Transp. Code § 550.065(c)(4)). Under this provision, a law enforcement agency employing a peace officer who made an accident report is required to release a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *See id.* The county attorney is not the law enforcement agency that completed the accident report. Thus, the county attorney must withhold the accident report under section 550.065(b).

You assert that the remaining submitted information is confidential as medical records under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The information at issue consists in part of medical billing records. The Seventy-seventh Legislature amended chapter 159 of the Occupations Code, which defines a "billing record" as "a record that describes charges for services provided to a patient by a physician." *See* Act of May 23, 2001, 77th Leg., R.S., H.B. 398, § 1 (to be codified at Occ.Code § 159.001(1)). Further, the amendment provides that for purposes of the MPA, the term "medical record," does not include a billing record. *See id.* (to be codified at Occ. Code § 159.001(2)). Because you have not demonstrated that the MPA makes confidential the information at issue, we conclude that it may not be withheld under the MPA. We next address your section 552.103 claim.

Section 552.103 provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The county attorney has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The county attorney must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

In this case, you have submitted a notice of claim that the Harris County Commissioners' Court received on May 29, 2001, which you represent comports with the TTCA. Thus, we conclude that you have demonstrated that litigation was reasonably anticipated at the time the county attorney received the information request. After a review of the remaining submitted documents, hospital billing records, we agree that they relate to the anticipated litigation. Therefore, the county may withhold the hospital billing records under section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent that the county attorney possesses information responsive to this request for categories other than one and two, the county attorney must release such information to the requestor. The county attorney must withhold the peace officer's accident report under section 550.065(b) of the Transportation Code. The county attorney may withhold the remainder of the submitted information under section 552.103(a) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

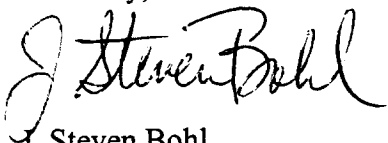
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Steven Bohl". The signature is fluid and cursive, with the first name "J." and last name "Bohl" clearly distinguishable.

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 151606

Enc: Submitted documents

c: Ms. Gena Pelfrey
Sullins, Johnston, Rohrbach & Magers
2200 Phoenix Tower
3200 Southwest Freeway
Houston, Texas 77027
(w/o enclosures)